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No. 85-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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MOTION TO DISMISS OR AFFIRM

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a public employer violates the First and Fourteenth Amendments when it allows employees to engage in private conversations with each other during non-work periods (such as lunch breaks) but forbids them to discuss employee organizations in those conversations.

2. Whether a public employer violates the First and Fourteenth Amendments when it allows employees the free use of internal message facilities to communicate with each other on personal matters but forbids them to use those facilities for messages about employee organizations.

3. Whether there is a concrete controversy over the prohibition of discussing employee organizations, where employers' officials testified that they understood their rules to forbid such discussions and asked employees to refrain from such discussions.

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MOTION TO DISMISS OR AFFIRM

The Texas State Teachers Association, the Garland Education Association, Joe Atkins, and Janice Hill, appellees in this Court, respectfully move for dismissal of the appeal or for affirmance of the decision below. This case does not properly fall within the Court's appellate jurisdiction. Moreover, it is manifest that the court of appeals correctly applied the principles established by decisions of this Court, and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

COUNTERSTATEMENT OF THE CASE

Texas State Teachers Association (TSTA) is a voluntary membership organization that is affiliated with the National Education Association. The Garland Education Association (GEA) is a local affiliate of TSTA. The purposes of TSTA and GEA include improving the working conditions and wages of school employees, enhancing the professional development of teachers, and improving public support for education. The organizations also engage in a wide range of political activity, supporting legislation and endorsing political candidates that favor the interests of educators. Both organizations have members among the faculty of Garland Independent School District (GISD), including appellee Janice Hill.

The decision that is the subject of this appeal has an extremely narrow focus. Although appellees made a number of claims below, the court of appeals ruled against appellants on only two. Those two claims were based on GISD's action in singling out one topic—employee organizations, such as TSTA and GEA—and prohibiting employees both from discussing that topic during non-work time when they are free to discuss anything else, and from using certain internal message facilities for communications on that topic, even though they are free to use those facilities for any other purpose.

The decision below was based on a record that had been presented in support of cross-motions for summary judgment. Most of that evidence was undisputed, and to the extent that any dispute appeared, the court of appeals concluded that it was not material to appellees' right to judgment on these two issues.

It was undisputed that GISD allowed its employees freely to engage in private conversations during non-work periods, such as breaks and lunchtime. There was only one subject they were forbidden to discuss. GISD officials interpreted GISD Administrative Regulation 412

to prohibit employees during "school hours" (the entire period from 8:00 a.m. to 3:45 p.m.) from discussing any kind of business on behalf of an employee organization, or from "promoting" such an organization. *See* J.S. at 8-10. The deposition testimony of GISD officials also established that many of those officials understood the regulation to forbid all other discussions of employee organizations during school hours. The Superintendent, for example, testified as follows:

> Q. Can four non-elected members of TSTA who happen to be teachers and who happen to be taking a 10-minute coffee break in your teachers' lounge or work room—can they legitimately discuss next month's TSTA seminar in Austin?
>
> A. We ask our staff members [to] refrain from discussing professional organizations and associations during the course of the school day.
>
> Q. From 8:00 to 3:45?
>
> A. 8:00 to 3:45.
>
> Q. So it would be technical violation?
>
> A. Yes.

J.S. App. at B-15. The Assistant Superintendent testified:

> Q. Can you tell me whether the district has a policy or practice which prohibits teachers from discussing teacher employee organization matters between the hours of 8:00 and 3:45 on school days?
>
> A. Yes, we do.
>
> Q. Does it matter what the content of the conversation is or where on campus it occurs?
>
> A. No, it doesn't.
>
> Q. Are two teachers—does it matter whether they are members or nonmembers of an organization?
>
> A. No.

Q. If two teachers then are walking down the hall going to lunch and they start chatting about an upcoming TSTA seminar in Austin, is this a violation of that policy?

A. Technically it would be.

Id. at B-14. Several principals were uncertain about the exact sweep of the rule,[1] but one principal testified that to "be safe" a teacher should not discuss anything having to do with an employee organization, "whether it's recruitment or whether it's a TSTA sponsored classroom technique workshop." [2]

In regard to the actual enforcement of this rule, the testimony was that school officials made no active effort to monitor teachers' private conversations. At the same time, there was no evidence that the officials would refrain from enforcing the rule if they overheard a conversation about an employee organization or if such a conversation were reported to them. J.S. App. at B-17.

It was also undisputed that GISD allowed teachers the free use of some internal mail facilities and certain bulletin boards. Teachers were allowed to use these facilities even for purely private purposes. There was only one exception: all messages or materials pertaining to employee organizations were excluded.

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[1] For example, Principal Collins testified that teachers may discuss employee organizations unless it is an "act of promotion," but he stated that the rule would be violated merely by a discussion of the agenda of an upcoming TSTA meeting (Rec. N., p. 22). Principal White testified that it would be impermissible to mention a teacher organization "in a tone of promotion" (Rec. K, pp. 36-38), meaning that the rule would allow "casually mentioning a professional organization but not talking about a professional organization" (*id.*, p. 35).

[2] Rec. J. (Richey), pp. 54-55. *See also* Rec. H. (Nix), pp. 42-43 (policy does not permit teachers "to say or write anything regarding their teacher organizations" in teachers' workroom or anywhere else on campus).

The district court granted GISD's motion for summary judgment on these issues. J.S. App. at A-17-19. The court of appeals reversed in part, holding that the First Amendment was violated by GISD's application of Administrative Regulation 412 to make employee organizations a forbidden topic in private conversations on non-work time and in the use of those internal communication facilities that were otherwise available for individual employees' use. The ground for both of these holdings was that school officials could not draw such distinctions based on the content of speech where that speech did not "materially or substantially interfere[] with the activities or discipline of the school." J.S. App. at B-14, quoting from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-09 (1969); J.S. App. at B-18.

ARGUMENT

The questions presented in this case are very narrow. The judgment below does not involve any challenge to a public employer's right to limit the times and places in which employees may talk about topics other than their work. It does not involve any challenge to a public employer's right, if it chooses, to reserve its internal message facilities for official communications and to preclude employees from using them for private reasons. Nor does it involve any issue of whether an employer must give organizations or other "outsiders" access to the workplace or to the employer's internal message facilities in order to communicate with employees. The only question raised by the judgment below is whether an employer that allows its employees to speak freely among themselves on non-work time, and to use the employer's internal message facilities for personal communications with other employees, may discriminatorily carve out one subject area on which all such conversations and communications are forbidden. The court of appeals held that by doing so, GISD had violated the well-established rule that

the First Amendment prohibits discrimination among speech on the basis of its content. This ruling is correct and is based on principles firmly established by this Court. There is no conflict among the circuits. It is therefore manifest that the questions on which the decision depends are so insubstantial as not to need further argument. The judgment below should be summarily affirmed.

Because the merits of the case are so clear, it is tempting to omit any argument on appellate jurisdiction, which is admittedly a closer question. However, because the form of this Court's disposition of the case depends upon the existence or nonexistence of appellate jurisdiction, we include a motion to dismiss the appeal as well as a motion to affirm the judgment below. As logic dictates, we address the question of jurisdiction first, and show that based upon principles established by the Court, the appeal should be dismissed for lack of appellate jurisdiction.

I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION.

This case does not fall within the appellate jurisdiction granted by 28 U.S.C. § 1254(2). That section provides for jurisdiction by appeal only when a party is "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." It is true, as appellant argues, J.S. at 4, that this Court has held that "legislative action" promulgated by a local administrative body such as a school board may be treated as a "State statute" for purposes of section 1254(2). *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 42-43 (1983). But jurisdiction under section 1254(2) does not exist merely because such a "statute" is somehow involved in a case. Appellate jurisdiction exists only in "cases in which a state statute is expressly struck down on constitutional grounds and [not in] those in which an exercise of authority under state law is invalidated without reference

to the state statute." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984). *See also, e.g., Wilson v. Cook*, 327 U.S. 474, 482 (1946).

To be sure, this Court has allowed appeals where a state statute was not declared invalid on its face but was held to be unconstitutional as applied to certain circumstances. *E.g., Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (plurality opinion). And the court of appeals in this case stated that it held "the application of the Regulation to these activities unconstitutional." J.S. App. at B-19. Nonetheless, the circumstances of this case place it in the category identified in *Silkwood* in which no appeal lies: the category of cases in which all that has been struck down is an "exercise of authority" under the state statute, rather than the statute itself.

The effect of the court of appeals decision in this case is not to hold the GISD regulation invalid. Its effect is merely to hold that school officials may not rely on that regulation to forbid communications on the subject of employee organizations in those settings where employees are freely allowed to communicate on all other subjects. The issue in this case is no different from what it would have been if no school regulation had been involved, but instead merely a school practice of forbidding employees to communicate on the subject of employee organizations. Indeed, on its face the regulation does not purport to discriminate against speech on the subject of employee organizations in employees' private conversations or in employees' use of school message facilities for private purposes. *See* J.S. at 5-6. The judgment of the court of appeals thus leaves the regulation in force according to its terms.

For these reasons, section 1254(2) would be stretched far beyond its original intent if it were applied here. Federal courts may declare a wide variety of state actions

unconstitutional, but Congress did not provide for appeal to this Court in all such cases. Congress confined the right of appeal to cases in which a state legislative enactment is held invalid. The Court has repeatedly "emphasized that statutes authorizing appeals are to be strictly construed." *Perry Education Ass'n, supra,* 460 U.S. at 43; *Silkwood, supra,* 464 U.S. at 247. That principle would be violated if a right of appeal were recognized in this case.

II. IN THE ALTERNATIVE, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED.

A. The judgment below rests solidly on a fundamental proposition of First Amendment law. To begin with, the First Amendment guarantees to teachers and other public employees the "rights to express their views and to associate with others for communicative purposes." *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271, 287 (1984); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969). The appellees in this case are thus protected by the fundamental proposition that the First Amendment forbids discrimination based on the content of speech except "in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 65 (1983). *See also Regan v. Time, Inc.,* —— U.S. ——, 104 S.Ct. 3262, 3267 (1984). The First Amendment's hostility to content-based discrimination not only forbids efforts to curtail expressions of a particular viewpoint, but also forbids efforts to restrain discussion "of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 537 (1980).

This basic principle, without more, requires affirmance of the judgment below. Having allowed employees to conduct private conversations during non-work periods, GISD cannot discriminate on the basis of content and ban discussions on the subject of employee organizations. The

only "extraordinary circumstances" that could justify such discrimination would be a showing that conversations on this subject during non-work periods would disrupt or interfere with the operation of the schools. *See Consolidated Edison Co., supra*, 447 U.S. at 539; *Tinker, supra*, 393 U.S. at 508-509. Appellant makes no such showing here.[3] Similarly, having allowed employees the privilege of using teacher mailboxes and certain bulletin boards for personal messages, GISD cannot discriminate on the basis of content and ban messages on the subject of employee organizations. Again, GISD has made no showing of disruption or interference that would justify this content-based discrimination.

B. Appellant invokes the concept of the "public forum" to justify its content-based discrimination in employees' use of internal message facilities. But that argument misconceives the "public forum" decisions of this Court. Even if "public forum" analysis is appropriate in this case, GISD's content-based discrimination is prohibited.

When use of public property is at issue, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, —— U.S. ——, 105 S. Ct. 3439, 3448 (1985). Under

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[3] Appellant argues that allowing teachers, in private conversations on non-work time, to "promot[e] an employee organization" or "perform employee organization business," would amount to a violation of the Texas Constitution, which forbids a grant of public funds to a private organization. J.S. at 18. The court of appeals correctly held, however, that allowing private conversations about employee organizations on non-work time would not constitute a grant of funds to those organizations "any more than to allow teachers to speak favorably of a political party, a church, a club, or a football team during the lunch hour constitutes an unlawful grant of public funds to such an organization." J.S. App. at B-16.

that analysis, property may be a traditional public forum (*e.g.*, public streets and parks, *see id.* at 3449), or a limited or "designated" public forum, open only to certain persons or for certain purposes (*e.g.*, public school board meetings or a city-owned theater, *see id.* at 3450). If the government, however, has not opened the property for any such use, or if the nature of the property is inconsistent with such a use, there is no public forum at all. *Id.* at 3450. In either a traditional public forum, or in a limited or "designated" public forum within the scope of its designation, the government may not enforce a content-based exclusion unless that exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Perry Education Association*, *supra*, 460 U.S. at 45, 46. But if the property is not a public forum at all, the government may justify a content-based exclusion on a mere showing that the exclusion is reasonable and not an attempt to restrict the expression of a particular viewpoint. *Id.* at 46.

Appellant argues that because GISD's internal mailboxes and bulletin boards are not a public forum for persons or organizations *outside* the schools, it can validly impose content-based restrictions on their use by personnel *within* the schools, based solely on a showing of reasonableness. J.S. at 11-13. That argument ignores the middle ground of the public forum analysis: the limited or "designated" forum open only to use by certain groups. The Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), establishes that the internal message facilities open for teachers' personal use in GISD are just such a "designated" forum.

In *Widmar*, the University of Missouri at Kansas City made its facilities available generally for the activities of registered student groups, with one exception: it excluded any group whose activities consisted of "religious worship or religious teaching." *Id.* at 265. The Court held that this exclusion violated the First Amendment. The uni-

versity had "created a forum generally open for use by student groups." *Id.* at 267. Having done so, it could not discriminate based on the content of a student group's speech unless that discrimination was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.* at 270.

This case is an exact parallel. It is undisputed that GISD allows its employees full use of certain internal message facilities—including teacher mailboxes and at least some bulletin boards—for any and all purposes, including purely private communications, with only one exception. That exception discriminates on the basis of content: it excludes all communications regarding employee organizations. As in *Widmar*, it is irrelevant that outsiders have no right of access to these facilities. Having opened the facilities for general use by employees, GISD cannot discriminate among various employees who would use those facilities based on the content of their messages. As in *Widmar*, that discrimination could be sustained only if it were narrowly tailored and necessary to serve a compelling interest.

Appellant here has fallen far short of showing such a compelling justification of its content-based discrimination. For justification, it relies on a state statute that prohibits any school district or school administrator from requiring or coercing teachers to join an employee organization. J.S. at 12. It is readily apparent, however, that a total ban on all communications about employee organizations is not "narrowly tailored" to avoid such coercion.

C. Appellant argues, on the issue of employee conversations during non-work time, that the court of appeals impermissibly substituted its own interpretation of the regulation for that of GISD's officials, and that its judgment was based on this improper interpretation. This argument is wrong on two grounds.

First, appellant concedes that GISD officially understood its regulation to prohibit all employees, even those

who were not elected officials of an organization, from "promoting" the organization or discussing any type of "business on behalf of the organization." J.S. at 8-10. The court of appeals correctly found that this prohibition alone would violate the First Amendment. J.S. App. at B-15-16. The right to discuss the advantages of joining an employee organization and to urge others to join is protected not only as part of free speech but also as part of the right of free association. *Thomas v. Collins*, 323 U.S. 516, 532-43, 537 (1945).[4]

Second, there was abundant evidence in the form of school officials' testimony—including testimony of the superintendent himself—that some officials understood *all* discussion of employee organizations to be prohibited. *See* pages 3-4, *supra;* J.S. App. at B-14-15 & n.9. The superintendent expressly testified: "We ask our staff members [to] refrain from discussing professional organizations and associations during the course of the school day." *See* J.S. App. at B-15 n.9. On that record, the court of appeals was entitled to conclude that there was no genuine dispute of fact about GISD's threatened prohibition of such discussions and to conclude that appellees were entitled to judgment as a matter of law.[5]

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[4] Moreover, even if mere discussion of the organization were protected speech while "promoting" it was not, any regulation attempting to draw that line would be unconstitutionally vague.

> [T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Thomas v. Collins, supra, 323 U.S. at 535-36. This danger is vividly illustrated by the testimony of one principal that "to be safe" an employee should avoid all discussion of employee organizations. *See* page 4 & n.3, *supra.*

[5] Appellants are wrong in arguing (J.S. at 9 n.6) that the court of appeals was bound, on review of an order granting summary judgment, by the "clearly erroneous" standards of Fed. R. Civ. P.

This dispute was not abstract or hypothetical.[6] Although school officials testified that they had no active program for monitoring employee conversations to detect violations, there was no evidence that they would not enforce their rules if a violation came to their attention. J.S. App. at B-17. Moreover, they "ask[ed]" and "expect[ed]" employees to refrain from conversations about employee organizations. *Id.* at B-15, B-17. The only way an employee could "be safe" was to refrain altogether from talking about employee organizations from 8:00 a.m. to 3:45 p.m. Page 4, *supra*. These facts were sufficient to create a genuine threat of enforcement and to support the court of appeals' conclusion that this was a concrete controversy. In virtually identical circumstances the Court found a concrete controversy in *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 298, 301-02 (1979).

D. Finally, contrary to appellants' argument, this case is not controlled by *Connick v. Myers*, 461 U.S. 138 (1983). First, *Connick* does not allow public employers to ban employee speech on questions of public concern. *Id.* at 144-46. A large proportion of speech pertaining to employee organizations is speech on matters of public concern. The business of TSTA and GEA includes lobbying and politics, and efforts to improve the quality of

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52(a). That rule applies only when there has been a trial of the facts. *Id.* The filing of cross-motions for summary judgment does not convert a summary judgment proceeding into "a trial on stipulated facts," or give the district court authority to "resolve[] fact issues and ma[k]e findings thereon" (J.S. at 9 n.6). *See, e.g., Arnsberg v. United States*, 757 F.2d 971, 975 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1183 (1986); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 114 (10th Cir. 1983); *National Ass'n of Government Employees v. Campbell*, 593 F.2d 1023, 1026-27 (D.C. Cir. 1978).

[6] Appellant does not contend that the dispute over using internal message facilities was abstract, but concedes that such privileges had specifically been denied to appellee Janice Hill, who is a teacher at GISD. J.S. at 8.

public education and to increase public support for education. Indeed, because in Texas (and many other states) public employee organizations are forbidden to engage in collective bargaining, virtually all of their activities on behalf of members take place in the political arena. *Connick* recognized that matters in the political arena are of public concern and that speech on these matters, as political speech, is at the core of the values protected by the First Amendment. *Id.* at 145. *Connick* also expressly acknowledged that the decisions protecting public employees' First Amendment rights were originally based upon the principle of freedom to join in associations and thereby "to participate in public affairs." *Id.* at 144-45. *See also Roberts v. United States Jaycees*, —— U.S. ——, 104 S. Ct. 3244, 3252 (1984). It follows that public employers under *Connick* may not do as GISD did and adopt a ban on all speech about employee organizations at times and in places where employees are otherwise free to speak.[7]

Second, to the extent that some speech on employee organizations may not address matters of public concern, the opinion in *Connick* emphasized that it does not hold speech on matters of private concern to be unprotected. 461 U.S. at 147. Instead it recognized that public agencies must have flexibility to respond to incidents of such speech, without having every case of employee discipline converted into a constitutional issue. *Id.* at 146-47. These principles, and the concerns that activate them, do not authorize public employers to adopt a content-based policy of prior restraint against speech on subjects that are deemed to be of only private concern. The reasons that content-based prior restraints are prohibited in other settings are equally applicable in the context of public employment. Prior restraints sweep together protected speech that cannot legitimately be the subject of prohibition and unprotected speech that validly can be prohibited.

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[7] See also *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940) (labor relations in general are matters of public concern).

The premise of the First Amendment is that—with only a few extraordinary exceptions—government must allow the speech, subject to the right of imposing "[s]ubsequent punishment for such abuses as may exist . . . consistent with constitutional privilege." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931). *See also id.* at 713-19; *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 584 n.6 (1983).[8]

Connick does not alter the rule forbidding prior restraints. It gives public agencies the right, after the fact, to discipline employees whose speech on matters of private concern is thought to harm employer interests. It does not give such employers the right to impose a prior restraint against all speech on certain subjects, at times and under conditions where employees are otherwise free to engage in private conversations.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of jurisdiction or the judgment below should be summarily affirmed.

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[8] This rule forbidding prior restraints applies to oral as well as written speech, and has been applied specifically to speech for the purpose of urging others to join employee organizations. *See, e.g., Staub v. City of Baxley*, 355 U.S. 313 (1958).